IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Leela Ram & Ashok Vs. State of Rajasthan
(D.B. Criminal Appeal No.1285/2002)

2. Santosh Vs. State of Rajasthan
(D.B. Criminal Jail Appeal No.173/2003)

3. Santosh Vs. State of Rajasthan
(D.B. Criminal Appeal No.071/2003)

D. B. Criminal Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 6-8-2002 in Sessions Case No.06/2000 passed by Sh. J.P. Sharma, RHJS, Additional Sessions Judge Kotputli, District Jaipur.

Date of Judgment: August 24, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. Arvind Kumar Gupta] for appellants Leela Ram and Ashok.
Mrs. Alka Bhatnagar]
Mr. Satyapal Poshwal, for appellant Santosh.

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Section 27 of the Indian Evidence Act,1872 represents loosely what is known as the `Doctrine of Confirmation by subsequent fact'. It seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. Santosh, Leela Ram, and Ashok, the appellants herein, were subjected to the said doctrine after about nine months of the incident of murder of Vishnu, son of an Advocate. They were put to trial before learned Additional

Sessions Judge Kotputli District Jaipur, who vide judgment dated August 6, 2002 convicted and sentenced each of them as under:-

U/s.302/34 IPC:

Each to suffer imprisonment for life and fine Rs.1000, in default to further suffer six months simple imprisonment.

U/s.392 IPC:

Each to suffer rigorous imprisonment for ten years and fine Rs.500/- in default to further suffer three months simple imprisonment.

U/s.460 IPC:

Each to suffer rigorous imprisonment for ten years and fine of Rs.500/- in default to further suffer simple imprisonment for three months.

Substantive sentences were ordered to run concurrently.

2. It is the prosecution case that on June 17, 1999 at 1.30 AM informant Mahendra Kumar Rai (Pw.5) handed over a written report (Ex.P-8) to ASI Ranmal at BDM Hospital Kotputli to the effect that while his son Vishnu was sleeping in the chowk of his house, some unknown assailants scaled the wall of his house and caused injuries to Vishnu with sharp edged weapon. On hearing voice of Vishnu, informant and his family members came out of their rooms and saw Vishnu lying injured. Vishnu was removed to the hospital where he was declared dead. On that report a case bearing No.418/99 under section 302/34 IPC was registered at Police Station Kotputli and investigation commenced. Autopsy on the dead body was performed, sight was inspected, blood stained earth, blood stained clothes and handkerchief of deceased got seized. Chance foot impression moulds got lifted from the crime scene and statements of witnesses under section 161 CrPC got recorded. The assailants, however could not be nabbed for a long

time. It was on March 3, 2000 that Ashok Kumar, Leela Ram and Santosh, who were the accused and already in the custody of Police Station Kotputli in case No.31/2000 under sections 457/380 IPC, also found involved in the murder of Vishnu and got arrested on March 3, 2000 in case No.418/99 under section 302 IPC. The police on the basis of their disclosure statements, got recovered wrist watch, chain, purse, identity card, blood stained clothes, knives and motor cycle. Thereafter charge sheet was filed and in due course the case came up for trial before the learned Additional Sessions Judge Kotputli District Jaipur. Charges under sections 302 alternatively 302/34, 392 and 460 IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 20 witnesses. In the explanation under Sec.313 CrPC, the accused claimed innocence. Three witnesses in support of defence were examined. Learned trial Judge on hearing final submissions convicted and sentenced the accused as indicated herein above. We have given our thoughtful consideration to the submissions advanced before us and gave a close look to the material on record.

3. In the absence of any eye witness to prove its case the prosecution relied upon the following circumstances to connect the appellants with the offence alleged against them:-

(i) Death of Vishnu was homicidal in nature.
(ii) Chance foot impression moulds lifted from the crime scene matched with foot prints of appellants Leela Ram and Santosh.
(iii) Razor and knives allegedly used in commission of offence got recovered at the instance of appellants Ashok, Leela Ram and Santosh.
(iv) Purse containing identity card of deceased, broken silver chain and wrist watch belonging to deceased recovered at the instance of appellants.

(v) Clothes stained with blood got recovered at the instance of appellants.
(vi) Motor cycle used in commission of offence got recovered on the basis of disclosure statements of appellants.

HOMICIDAL DEATH:

4. The prosecution has established that death of Vishnu was homicidal in nature. As per post mortem report (Ex.P-20) following ante mortem injuries were found on the dead body:-

1. Cut brought injury with incised wound at whole thickness of proximal inter phalangeal joint of left index finger.
2. Incised wound sized 2cm x 1cm x skin deep at Rt. acromian clavicle joint.
3. Incised wound sized 6cm x 4cm x 4cm at the central part of adjacent to the right posterior axillary wall.
4. Incised wound sized 5cm x 3cm x muscles deep at the right index scapular region.

In the opinion of Dr.Om Singh Meena (Pw.9) the cause of death was hypo volacmic shock as a result of excessive hemorrhage from injuries to upper lobe of right lung.

FOOT-IMPRESSION MOULDS:

5. Second incriminating circumstance relied upon by the prosecution was that left and right foot impression moulds of appellants Leela Ram and Santosh matched with the chance prints lifted from the crime scene. Ran Mal Singh ASI (Pw.15) deposed that he lifted two chance foot impression moulds from the crime scene vide memo Ex.P-7. Superintendent of Police Jaipur (Rural) sent two packets of foot impression moulds to Director Finger Prints Bureau Jaipur (FPB) for comparison. Opinion of Director FPB dated August 20, 2001 (Ex.P-31) thereafter was received that

reads as under:-

"OFFICE OF THE DIRECTOR FINGER PRINT BUREAU RAJASTHAN JAIPUR.

Sub: Comparison of chance foot impression moulds in Cr.No.418/99 302 IPC PS Kotputli District Jaipur.

Ref: Supdt. Of Police Jaipur Rural Jaipur's letter No.5939-40 dated 29-3-2001.

1. Received packet containing chance foot impression moulds marked A & B lifted from crime scene on 17-6-99.

Material received for examination.

2. Received packet containing specimen left & right foot impression moulds of the following persons prepared on 1-3-2000.

i. Lila s/o Prabhu Ga & Gha

ii. Santosh s/o Bhanwar Lal Kha & Ka.

Note: 1. Specimen left foot impression mould marked Kha of Santosh has been received in broken condition.

2. Specimen right foot impression mould Ka of Santosh & specimen right foot impression mould marked Gha of Lila were broken & have been stucked by IO.

OPINION

Chance foot impression mould marked A & B have been examined and compared with the specimen left & right foot impression moulds of two persons sent. The result thereof is as under:-

I. Chance foot impression mould marked A is similar with specimen right foot impression mould marked Ka of Santosh. Following similar features have been observed in both:

1. Tracing of outer margin of both virtually coincide over each other, the difference shown with red dotted lines in toes regions is due to displacement of sand.

2. Length of foot from A to B is 24.8 cms in both.

3. Breadth of heel from C to D is 5.5 cms in both.

4. Angutha is spear shape in both & is longer then Dusari.

5. Dusari is shorter than angutha & longer than Tisari & is placed away from angutha & tend to incline over Tisari.

6. Tisari is longer than Chauthi & shorter than dusari & placed away from Chauthi.

7. Chauthi is shorter than Tisari & longer than Chhichi & placed

midway between Tisari & Chhichi.
8. Chhichi is shorter than Chauthi & placed away from Chauthi.
9. Zanziri has convities at HI & concavity at E,F,&G.
10. Pab is broad.
11. Dhar Rekhas J&K prominent in both.
12. Talli is long.
13. Chab is absent in both.
14. Eri is indistinct in both.
15. Bari assi has similar curves in both.
16. Chhoti assi has similar curves in both.
17. Line AL cuts dusari, tisari, chauthi & touches Chhichi in both.

From the above similar features present in both moulds, we are of the opinion that chance foot impression mould marked A& specimen right foot impression mould marked Ka are similar with each other & have been made by the same foot i.e. Right foot of Santosh.

II. Chance foot impression mould marked B is similar with specimen right foot impression mould marked Gha of Lila. Following similar features have been observed in both:-

1. Tracing of outer margin of both virtually coincide over each other. The difference shown with red dotted lines due to displacement of send.
2. Length of foot from A to B is 26.1 cms in both.
3. Breadth of heel from C to D is 5.5 cms in both.
4. Angutha is long & oval in shape. Its kanth rekha at M is prominent in both.
5. Dusari is shorter than angutha & longer than tisari & placed away from tisari.
6. Tisari is longer than Chauthi & shorter than dusari & placed midway between dusari & chauthi.
7. Chauthi is shorter than Tisari & longer than Chhichi.
8. Chhichi is shorter than Chauthi & placed away from Chauthi.
9. Zanziri has converties at G,H,J & concavity at I,K in both.
10. Pab is broad in both.
11. Chab is null prominent in both.
12. Talli is narrow & long in both.
13. Eri is indistinct in both.
14. Bari assi has similar curves in both.

15. Chhoti assi has similar curves in both.
16. Line A to E cuts dusari, tisari & chauthi & touches Chhichi in both.

From the above similar features present in both moulds, we are of the opinion that the chance foot impression mould marked B & specimen right foot impression mould marked Gha are similar with each other & have been made by the same foot i.e. Right foot of Lila."

The report Ex.P-31 got exhibited by Iqbal Ahmed (Pw.17) Director FPB.

6. Having closely scanned the material on record we notice that the Investigating Officer did not care to take foot impression moulds before or under the order of a Magistrate as required by Section 5 of the Identification of Prisoners Act. Although under section 4 of the Identification of Prisoners Act, Police is competent to take foot impression moulds of the accused but to dispel any suspicion as to its bonafides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. Their Lordships of the Supreme Court in **Mohd. Aman Vs. State of Rajasthan (1997)10 SCC 44** observed in paras 8 and 9 as under:- (Paras 8 & 9)

"... Even though the specimen finger prints of Mohd. Aman had to be taken on a number of occasion at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take finger prints of the accused but to dispel any suspicion as to its bonafides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. The other related infirmity from which the prosecution case suffers is that the brass jug,

producion of which would have been the best evidence in proof of the claim of its seizure and subsequent examination by the Bureau, was not produced and exhibited during trial- for reasons best known to the prosecution and unknown to the court. For the foregoing discussion we are unable to sustain the convictions of Mohd. Aman."

"... So far as the footprints are concerned, another reason for which we feel it unsafe to accept the evidence led in this regard is that the sample footprints were not taken before a Magistrate. This apart the science of identification of footprints is not a fully developed science and therefore if in a given case – unlike the present one – evidence relating to the same is found satisfactory it may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence..."

(Emphasis Supplied)

Since in the instant case foot impression moulds were not taken before a Magistrate, we feel it unsafe to accept the evidence led in this regard.

DISCLOSURE STATEMENTS & RECOVERY:

7. As already noticed the appellants Ashok Kumar, Leela Ram and Santosh, who were already in the custody of Police Station Kotputli in a case bearing No.31/2000 under sections 457 and 380 IPC, also got arrested on March 3, 2000 in case No.418/99 registered under section 302 IPC. The reason as to why they were arrested subsequently in another case was however not disclosed. It only appears that immediately after their arrest, they gave information under section 27 of the Evidence Act. The details of information may summarized thus:-

(i) Vide memo Ex.P-33A Leela Ram on March 4, 2000 at 9 AM gave information about the Motor Cycle allegedly used in commission of the offence. Pursuant to that Hero Honda motor cycle got recovered

vide memo (Ex.P-22) on March 4, 2000 from the house of Bal Ram situated in village Dhanota. Motor Cycle did not bear number plate. Time of recovery was however not mentioned in the memo.

(ii) Vide memo Ex.P-34 Leela Ram on March 5, 2000 at 7.30 AM gave information about Chhurra (knife) allegedly used in commission of the offence. Pursuant to that Chhurra got recovered vide memo (Ex.P-16) on March 5, 2000 from the the heap of sand lying in front of the house situated in village Sunderpura. Time of recovery was not mentioned in the memo.

(iii) Vide memo Ex.P-36 Leela Ram on March 5, 2000 at 9 AM gave information about clothes wore by him at the of committing the offence. Pursuant to that old and uncleaned white shirt and Pajama (trouser) stained with blood got recovered vide memo (Ex.P-18) on March 5, 2000 from the house of Leela Ram situated in village Sunderpura. Time of recovery was not mentioned in the memo.

(iv) Vide memo Ex.P-38 Leela Ram on March 6, 2000 at 7 AM gave information about wrist watch allegedly belonging to deceased. Pursuant to that, wrist watch HMT got recovered vide memo (Ex.P-24) on March 6, 2000 from the house of Bal Ram situated in village Ssunderpura. Time of recovery was not mentioned in the memo.

(v) Vide memo Ex.P-35 Santosh on March 5, 2000 at 8 AM gave information about Chhurra (knife) allegedly used in commission of the offence. Pursuant to that Chhurra got recovered vide memo (Ex.P-17) on March 5, 2000 from his Chappar (hut) situated in Dhani Radhdo

near village Sunderpura. Time of recovery was not mentioned in the memo.

(vi) Vide memo Ex.P-37 Santosh on March 5, 2000 at 10 AM gave information about clothes wore at the time of committing the offence. Pursuant to that, ready-made track-suit, Baniyan (vest) with 3 black strips and Pajama (trouser) with 3 white strips stained with blood got recovered vide memo (Ex.P-19) on March 5, 2000 from the house situated in Dhani Radhdo near village Sunderpura. Time of recovery was not mentioned in the memo.

(vii) Vide memo Ex.P-39 Santosh on March 6, 2000 at 8 AM gave information about broken silver chain with locket allegedly belonging to deceased. Pursuant to that, recovery of broken silver chain with locket got affected vide memo (Ex.P-25) on March 6, 2000 from the house of Santosh situated in Dhani Radhdo near village Sunderpura. Time of recovery was not mentioned in the memo.

(viii) Vide memo Ex.P-40 Ashok on March 6, 2000 at 9 AM gave information about Ustra (razor) allegedly used in commission of the offence and purse of the deceased. Pursuant to that, razor with yellow plastic handle stained with blood and purse containing admission card of Vishnu got recovered vide memo (Ex.P-23) on March 6, 2000. Time of recovery was not mentioned in the memo.

8. A close look at the statement of Gopi Singh IO (Pw.20) goes to show that on the basis of disclosure statements, he had earlier visited the houses of the appellants and got recovered theft goods. Gopi Singh admitted

in his cross examination admitted that in connection with the investigation of case No.15/2000 he had gone to the house of Leela on March 2, 2000 and got recovered grocery goods (Parchoon ka Saman). Similarly he visited the house of Santosh on February 27, 2000 situated at Dhani Radhoda. He also admitted to have visited many a times the house of Ashok.

9. Strangely during the first search of the houses of the appellants the incriminating articles recovered during second search were not found. All the three appellants were in custody and they had no access to their houses during period between first and second search. This only shows that entire story of search and recovery of articles is a myth. In a similar situation Their Lordships of the Supreme Court in **Ramesh Babu Lal Doshi v. State of Gujarat 1996(9) SCC 225** observed as under:-

> "... Admittedly the flat of the appellant was searched in the night between 4-9-1980 and 5-9-1980 by the police after breaking open its lock. At that time except a pair of trousers, nothing incriminating was found by the police, much less seized. It is also the admitted case of the prosecution that after the flat was searched it was locked again and the keys were kept with none other than the brother-in-law of the appellant the reasons for which we are unable to fathom. Be that as it may, it is also and admitted fact that since then the appellant had not access to his flat till it was searched on 9-9-1980. If in spite of these tell-tale circumstances a lot of articles – containing Group A blood – was found inside that flat on 9-9-1980 – it only shows that the entire story of search and recovery of the articles is a myth."

10. Further look at the material on record demonstrates that Bhagwan Sahai (Pw.8) and Arvind Kumar (Pw.11), who resided at Kotputli were motbirs of recoveries effected at village Sunderpura on March 5, 2000

vide memos Ex.P-16, Ex.P-17, Ex.P-18 and Ex.P-19. Recoveries on March 4 and 6, 2000 were made in presence of police persons viz. Prithvi Singh Head Constable (Pw.14) and Bheem Singh Constable (Pw.12). In his deposition Bhagwan Sahai Advocate (Pw.8) stated that he along with Arvind Kumar (Pw.11) had gone to village Sunderpura to purchase buffalo. Both these witnesses had gone to village Sunderpura for the first time. In his cross examination Bhagwan Sahai stated as under:-

> "हम ग्राम सुन्दरपुरा मे अन्दाज से भैंस खरीदने गये थे। मैं सुन्दरपुरा मे व्यक्तिशः किसी आदमी को नहीं जानता हूं। 10-15 घरों से भैंस के लिए पूछताछ की थी। मैंने किन लोगों से पूछताछ की उन लोगों के नाम नहीं जानता। पुलिस के जाने के बाद हम भी भैंस देखते रहे। मेरी वकालत के दौरान व राजनैतिक दौरों के दौरान मैं कभी भी ग्राम सुन्दरपुरा में नहीं गया।"

Arvind Kumar (Pw.11) deposed thus:-

> "सुन्दरपुरा मैं मेरी खुद की मोटर साइकिल से गया था। मेरे साथ भगवान सहाय साथ थे। हम एक डेढ बजे सुन्दरपुरा पहुंच गये थे। भगवान सहाय जी भैंस खरीदने के लिए गये थे। उनको मोटर साइकिल चलानी नहीं आती इसलिए मैं उनके साथ गया था। हमने दस 12 जगह भैंस देखी थी। ... एस एच ओ गोपी सिंह जी भगवान सहाय जी को जानते थे, नमस्कार किया। हम पुलिसवालों के साथ हो गये।"

We have also scanned the statements of Prithvi Singh HC (Pw.14) and Bheem Singh Constable (Pw.12). On examining the testimony of Bhagwan Sahai, Arvind Kumar, Prithvi Singh and Bheem Singh from the point of view of trustworthiness, we find ourselves unable to place reliance on them. In our opinion they are not reliable witnesses. In the absence of independent witnesses and time of alleged recovery on recovery memos, the evidence of disclosure statements and the consequent recovery of articles do not at all inspire confidence.

11. In **Harjit Singh v. State of Punjab (2002)6 SCC 739** observed that it is unbelievable that all the accused persons who have alleged to use their firearms/ weapons kept all the arms concealed in an open field in a gunny bag under a heap of straw. In the absence of independent witnesses and the alleged place of concealment being accessible to the public, the evidence of disclosure statement and the consequent recovery of arms and weapons do not at all inspire confidence. In any case, it is not a piece of evidence which could be relied on by the trial court to convict the accused by treating it as eyewitness account.

12. In **Bhupan v. State of MP (2002)2 SCC 556**, the Apex Court held that the mere fact of the prosecution having recovered a sword at the instance of appellant, on facts and circumstances of this case would not permit us to base a conviction under section 302 IPC in the background of the fact that almost all other evidence produced by the prosecution are disbelieved by the courts below.

13. The alleged recovered articles viz. wrist watch, broken silver chain, and identity card were articles of little value which no accused would have carried after committing a crime. In **Bhagwan Singh v. State of MP (2003)3 SCC 21**, the Apex Court held that as far as the evidence of recoveries of certain articles of the deceased on the alleged information given by the accused is concerned, such evidence in itself is too weak a piece of evidence to sustain the conviction of the accused. The trial Judge has held that the recovery of a bottle under memorandum (Ext.P-13), which is an article too ordinary to be stolen and a religious book Vishram Sagar with spectacles belonging to the house of the deceased were articles of little

value which no accused would have carried after committing a crime.

14. So far as recovery of blood stained clothes of appellants is concerned, we find that since blood samples of the appellants were not collected, it does not link the appellants with the crime. It is inexplicable as to why appellants would have carried uncleaned blood stained clothes after committing a crime. In **Subhash Chand v. State of Rajasthan (2002)1 SCC 702** the Apex Court observed that there is no investigation directed towards finding out and no evidence worth its name collected and adduced in the court to show that the underwear and baniyan were of the accused. Insofar as the baniyan is concerned, it has no stains of any type on it and therefore its recovery and seizure is meaningless and irrelevant. So far as the underwear is concerned, the investigating suffers from another infirmity also. Blood sample of the accused was not collected and therefore not grouped. No evidence is available to show as to what was the blood group of the accused and therefore the possibility of blood on the underwear being of the accused himself cannot be and is not ruled out. The number and extent of spread of stains is also not known.

15. It is well settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests:-

> (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
> (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
> (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

16. Applied these lucid tests to the facts of the case on hand we find that evidence adduced at the trial is not qualitatively such that on every reasonable hypothesis the conclusion is that appellants are guilty.

17. The Investigating Officer of the case, it appears, was not well versed with the techniques of his job. He did not make efforts to collect the threads of evidence finding out the path which leads to the culprit. Undoubtedly the assailants who scaled the wall of the house of an Advocate did not intend to commit theft of an ordinary wrist watch, or a silver chain. Their intention was to kill Vishnu, who used to reside in Uttar Pradesh and came to his father to live with him only for few days. Instead of nabbing actual culprits, the Investigating Officer appears to have solved a sensational case of Kotputli by involving ordinary thieves. Their Lordships of the Supreme Court in **Subhash Chand v. State of Rajasthan (2002)1 SCC 702**, indicated about clueless crimes thus:- (Para 26)

> "The ends, which the administration of criminal justice serves, are not achieved merely by catching hold of the culprit. The accusation has to be proved to the hilt in a court of law. The evidence of the investigating officer given in the court should have a rhythm explaining step by step how the investigation proceeded leading to detection of the offender and collection of evidence against him."

18. In the ultimate analysis we find that in the instant case the doctrine of Confirmation by subsequent fact could not be made applicable properly and the prosecution has failed to bridge the gap between `may be true' and `must be true' by clear, cogent and unimpeachable evidence and

guilt against the appellants is not proved beyond reasonable doubt. There are many missing links in the chain of circumstantial evidence and this aspect was not properly considered by the learned trial court.

19. For these reasons, we allow the appeals and set aside the judgment dated August 6, 2002 of the learned Additional Sessions Judge Kotputli. We acquit the appellants of the charges under sections 302/34, 392 and 460 of Indian Penal Code. The appellants Santosh, Leela Ram and Ashok, who are in jail, shall be set at liberty forthwith, if they are not required to be detained in any other case.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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